LAGUNA GATUNA, INC.

IBLA 90-318 Decided December 3, 1991

Appeal from a decision of the Carlsbad Resource Area Manager, Bureau of Land Management, adjusting the rental charges for salt water disposal site right-of-way NM 36791 from a per acre fee to a fee per barrel of disposed salt water.

Affirmed.

1. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

   The holder of a right-of-way grant for a salt water disposal site is required to pay annually, in advance, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices. In accordance with 43 CFR 2803.1-2(c)(3)(i), rental for non-linear right-of-way grants must be based on a market survey of comparable rentals or on a value determination for specific parcels.

2. Appraisals--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Appraisals

   A BLM decision adjusting the rental for a salt water disposal site right-of-way from a per acre fee to a fee per barrel of disposed water will be affirmed where the adjusted rental is based on a market survey of comparable salt water disposal leases which indicates that a per barrel fee is utilized in the market place to determine rentals, and the appellant has neither demonstrated error in that methodology nor shown that the rental charges are excessive.

APPEARANCES: J. W. Neal, Esq., Hobbs, New Mexico, for Laguna Gatuna, Inc.; Margaret C. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

121 IBLA 302

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Laguna Gatuna, Inc. (Laguna), has appealed from a March 15, 1990, decision of the Carlsbad Resource Area Manager, Bureau of Land Management (BLM), adjusting the rental charges for salt water disposal site right-of-way NM 36791 from a per acre fee to a fee per barrel of disposed water, and requesting $11,104 as rental for the period May 29, 1989, to May 29, 1990.

On October 19, 1979, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988), BLM issued right-of-way NM 36791 to Pollution Control, Inc., effective May 29, 1979, for a 30-year term. The grant authorizes the use of approximately 450 acres of public land, 1/ including parts of Laguna Gatuna, a naturally occurring salt lake, as a salt water disposal facility for waste water produced from oil and gas wells in the vicinity. 2/ Paragraph 9 of the terms and conditions of the grant specifically provides: "The right-of-way herein granted shall be subject to the express covenant that if other administrative costs and/or rentals are due, as indicated by an appraisal, they shall be paid upon request."

In March 1980, BLM appraised right-of-way NM 36791 to determine its fair market rental value. After concluding that the highest and best use of the land was for the surface disposal of produced waters, the appraiser used the comparable sales appraisal method to value the subject public lands based on a per acre value. See March 14, 1980, Appraisal Report at 4-9. By decision dated June 27, 1980, BLM notified Pollution Control, Inc., that based on the appraisal, it had determined that the fair market rental value for the right-of-way was $990 per annum or $6,930 for a 10-year period. On July 3, 1980, Pollution Control, Inc., submitted a check for $6,930 for the 10-year period.

In March 1989, on behalf of the Roswell District Manager, a Realty Specialist in the Carlsbad Resource Area Office submitted a request to the Chief State Appraiser for an appraisal of right-of-way NM 36791 naming Laguna as the right-of-way holder. 3/ In response thereto BLM prepared a report entitled "Market Survey Salt Water Disposal Well Leases

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1/ Specifically, the land subject to the right-of-way includes the S½ SE¼ sec. 7, W½ NW¼ NW¼, SW¼ NW¼, and NW¼ SW¼ sec. 17, NE¼ and N½ SE¼ sec. 18, N½ NE¼ NE¼ sec. 19, and that part of the S½ NE¼ NE¼ sec. 19 lying north of U.S. Highway 62-180, T. 20 S., R. 33 E., New Mexico Principal Meridian, Lea County, New Mexico.

2/ Pollution Control, Inc., had operated the salt water disposal facility since May 28, 1969, under special land use permit (SLUP) NM 8146. In reviewing the SLUP prior to its expiration, BLM determined that renewal should be in the form of a right-of-way since the operation was a long-term use rather than a temporary one. See Supplemental Environmental Assessment Record (date-stamped July 25, 1979) at 1.

3/ Apparently the right-of-way was transferred to Laguna in September 1988. See Feb. 27, 1990, letter from Laguna to BLM. The case file does

in Southeastern New Mexico," dated November 28, 1989. Therein, a BLM appraiser explained that prior to 1980, salt water disposal well lease rentals were viewed as a fee for use of the surface rights to the land. 4/ After 1980, such salt water disposal well leases shifted to rental based on a fee per barrel of disposed water, and the appraiser concluded that rental based on a price per barrel had become the norm for the southeast New Mexico market. In determining the fair market rental value for BLM salt water disposal leases, the appraiser utilized the comparable lease appraisal method, analyzing 13 salt water disposal well leases with rentals based on a per barrel fee. He found that the lowest per barrel fee charged was $0.015, and that a minimum rental of $1,800 was representative of the market as a whole. He therefore recommended that the rental for salt water disposal wells on BLM land should be a minimum of $1,800 per year or $0.015 per barrel, whichever was larger.

By memorandum dated January 8, 1990, the New Mexico State Director communicated the results of that market survey to the Roswell District Manager and endorsed its utilization to establish rental rates.

In a February 28, 1990, decision BLM requested that Laguna pay $16,093 in rental for the period from May 29, 1989, to May 29, 1990, based on a charge of $0.015 per barrel of disposed saltwater. 5/ On the same day, BLM received a check from Laguna for $6,930 as payment of rental for the next 10 years at the original rental rate.

In the March 15, 1990, decision under appeal the Area Manager rescinded the February 28, 1990, decision and adjusted the right-of-way charges. He explained that Laguna had provided additional information concerning the rental determination at a meeting on March 13, 1990, and that the rental had been reduced by 31 percent to allow for that portion of Laguna Gatuna which was not Federal land. He found that the appropriate rental for the period from May 29, 1989, to May 29, 1990, was $11,104, and that after crediting the $6,930 already received, the balance due was $4,174. The Area Manager stated that BLM reserved the right to update the rental charges whenever

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fn. 3 (continued)
not contain an approved assignment of the right-of-way, although it does include an Oct. 3, 1988, bond rider changing the name of the principal from Pollution Control, Inc., to Laguna. We note that the regulations require that an application for assignment of a right-of-way be filed with BLM and provide that an assignment will not be recognized unless and until BLM approves it in writing. 43 CFR 2803.6-3.

4/ The appraiser noted that the most common means of salt water disposal was by injection into an abandoned well, and that the alternative, disposal via an evaporation pond, was rare. Consequently, the market survey focused on disposal well leases.

5/ According to a handwritten worksheet dated Feb. 20, 1990, BLM computed the $16,093 rental by averaging Laguna's monthly disposal reports filed with the State of New Mexico for 8 months to project a yearly disposal figure of 1,072,852.5 barrels and multiplying that number by $0.015 per barrel.

necessary to reflect changes in the fair market rental value of the right-of-way, and established the new rental due date as May 29, 1990. 6/

In its statement of reasons for appeal (SOR), Laguna argues that neither paragraph 9 of the right-of-way grant nor 43 CFR 2803.1-2 authorizes the method used by BLM to increase the rental for the right-of-way. Laguna asserts that BLM did not use the standard of fair market rental value in setting the rental and challenges BLM's right to inject into the grant the condition that a new rental may be determined each year. Laguna contends that the rental does not reflect the fair market value of the land because, according to Laguna, the subject land has little value; rental based on $0.015 per barrel equals 5 percent of its gross revenues; and such a rental basis is not authorized by law, especially for lands having little, if any, value. Laguna claims that BLM's rental determination "constitutes a taking of Laguna's business not based upon any comparable commercial practices in the area and is not on the basis of sound business management principal [sic]" (SOR at unnumbered page 5).

Laguna argues that its business protects the environment and provides benefits to the public which make the per barrel rental charge unreasonable and not in the public interest. It asserts that BLM's arbitrary increase in the rental, of which it claims it had no prior notice, will cause it undue economic hardship because it based various contracts on its belief that the rental would remain at its initial level, and these contracts cannot now be modified to enable Laguna to recoup the additional costs. Laguna concludes that rental waiver or reduction would be in the public interest.

In its response, BLM argues that paragraph 9 of the right-of-way grant authorizes the readjustment of rental, "as indicated by an appraisal," and that 43 CFR 2803.1-2 mandates that the right-of-way holder pay annually in advance the fair market rental value as determined by BLM applying sound business management practices. It admits that it did not conduct an appraisal as such before adjusting the rental but contends that it did apply sound business management practices by conducting a market survey, the use of which has previously been upheld by the Board. It explains that a specific appraisal was not considered practical because there was no relationship between common comparison factors such as location, terrain, and utilities; rather, according to BLM, the only significant comparison factor was the quantity of disposed water, with larger quantities corresponding to lower prices per barrel. BLM notes that it selected the lowest market price of the comparables as its per barrel rental fee.

6/ We note that BLM failed to adjust the rental due date of this right-of-way, as required by 43 CFR 2803.1-2(a), which provides that "[a]nnual rent billing periods shall be set or adjusted to coincide with the calendar year (January 1 through December 31) by proration on the basis of 12 months * * *."

BLM discounts Laguna's claim that rental should be based on land values, noting that although the original rental was based on those values, the comparable lease appraisal method demonstrates that the market
has shifted to a per barrel rental basis and that rentals based on land values are unrealistically low. BLM counters Laguna's assertion that a per barrel rental charge is unauthorized by pointing out that the Board has upheld rental established on this basis.

BLM asserts that since the right-of-way grant clearly envisions the adjustment of rental charges, Laguna's contentions that BLM has injected a new factor into the grant by providing that rental may be adjusted annually and that Laguna had no prior notice that the rental would be increased lack merit. Furthermore, BLM argues that this is not the proper forum to decide whether its decision increasing the rental effectively constitutes a taking of Laguna's business since FLPMA mandates fair market rentals for right-of-way grants, and the Department lacks authority to declare a statute unconstitutional. Finally, BLM submits that Laguna's property right in the right-of-way is conditional by the very terms of the grant, and that appeal to this Board satisfies due process requirements. 7/

[1] Under section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1988), the holder of a right-of-way is required to pay rental annually in advance for the market value of the right-of-way when this value is established by an appraisal. Amax Magnesium, 119 IBLA 281, 283 (1991); Mallon Oil Co., 104 IBLA 145, 150 (1988), and cases cited therein. Departmental regulations also provide that

> [t]he holder of a right-of-way grant or temporary use permit shall pay annually, in advance, except as provided in paragraph (b) of this section, the fair market rental value as determined by the authorized officer applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices.

43 CFR 2803.1-2(a). Additionally, 43 CFR 2803.1-2(c)(3)(i) states that rental for non-linear rights-of-way "shall be determined by the authorized officer and paid annually in advance. Said rental shall be based on either a market survey of comparable rentals, or on a value determination for specific parcels * * *."

Generally, the preferred method for appraising the fair market rental value for non-linear rights-of-way is the comparable lease method of appraisal where there is sufficient comparable rental data. Colorado Interstate Gas Co., 110 IBLA 171, 175 (1989); Mallon Oil Co., supra at 151. The Board has stated on numerous occasions that a right-of-way rental

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7/ Although in its answer BLM offered to join in a motion for a limited remand of this case to enable it to obtain jurisdiction to adjudicate any waiver or reduction request made by Laguna, Laguna did not respond to that offer.

determination will not be set aside unless the appellant demonstrates error in the appraisal method used by BLM or shows by convincing evidence that the rental charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal. See, e.g., Western Field Production, Inc., 116 IBLA 225, 228 (1990).

[2] Although Laguna challenges the propriety of basing rental on the results of a market survey, the use of a market survey is specifically authorized by 43 CFR 2803.1-2(c)(3)(i), quoted above. As we stated in Colorado Interstate Gas Co., supra at 175-76, "[s]uch an approach is in essence the comparable lease method of appraisal where the fair market rental value of a right-of-way is derived from a review of the rentals charged for comparable leases, adjusting for any differences between the subject right-of-way and the selected comparable leases." Laguna's conclusory allegations of error fail to demonstrate that BLM chose an inappropriate appraisal method. 8/

We further reject Laguna's contention that BLM has no authority to charge rental based on a per barrel fee. BLM's market survey of comparable salt water disposal facility leases indicates that the market in southeastern New Mexico currently charges rental based on a per barrel fee. 9/ In Mallon Oil Co., supra, the Board upheld a BLM decision establishing rental charges for a salt water disposal well based on a per barrel fee. Laguna has not submitted another appraisal or any evidence that rentals for comparable leases are based on the value of the land, nor has it shown that BLM's choice of the lowest comparable per barrel fee results in excessive rental charges.

We also agree with BLM that paragraph 9 of the right-of-way grant provides sufficient notice that the rental for that right-of-way is subject to reevaluation, and that the grant, as well as 43 CFR 2803.1-2(a), authorize BLM periodically to review and adjust the rental based on the current fair market rental value of the right-of-way. Furthermore, Laguna's public interest and economic hardship arguments do not affect the fair market rental value of the right-of-way, but relate instead to the question of rental waiver or reduction under 43 CFR 2803.1-2(b)(2)(iv), an issue which is not properly before us. See Mallon Oil Co., supra at 151-52. Thus, Laguna has failed to persuade us that BLM's rental decision was improper.

8/ While Laguna claims that it had no knowledge of the contents of the market study, we note that the study was available for public inspection at BLM's offices, and a copy of it appears in the case file.

9/ The market survey, in fact, indicates that shortly after the 1980 appraisal for this right-of-way the market changed to a system where rental was based on a per barrel fee for the disposition of salt water. Accordingly, it appears that the rental charged Laguna for use of the public lands in question has been less than fair market value for a number of years.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. 10/

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

10/ Our decision to affirm BLM's rental determination does not foreclose Laguna from seeking a waiver or reduction of rental pursuant to 43 CFR 2803.1-2(b)(2)(iv). See Mallon Oil Co., supra at 152.